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No. 08-543

Supreme Court, U.S.
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In the Supreme Court of the United States

LAWRENCE R. POLINER, M.D.,
LAWRENCE R. POLINER, M.D., P.A.,
Petitioners,

v.

TEXAS HEALTH SYSTEM, doing business as Presbyterian Hospital of Dallas Texas, a Texas non-profit corporation, JAMES KNOCHEL, M.D.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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February 13, 2009

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PETITION FOR REHEARING

As a physician on behalf of patients and my fellow citizens, I humbly petition that the Honorable Justices of the United States Supreme Court reconsider ruling on the interpretation of law found in the Health Care Quality Improvement Act (HCQIA) to provide quality assurance to improve patient care.

All hospitals review care so that any deficiencies can be corrected to improve quality for patients. Analysis of care a physician provides to his patients is called peer review. Doctors need a protected environment so they may freely evaluate patient care. Administrative action may be taken to improve care. Hospital bylaws provide process. The legal immunity for peer review is provided by HCQIA. To protect patients and those involved in review including physicians whose patient care is reviewed, reasonable belief in the substance of care was required in the words of the Act. HCQIA also created the National Practitioner Data Bank to prevent bad doctors from traveling from place to place harming patients. Doctors who have removal of hospital privileges must be reported to the Data Bank as there is federally required reporting and interrogation by all hospitals for all physicians. The Data Bank report of loss of hospital privileges is meant to prevent a physician from holding those hospital privileges anywhere and can end a physician's career.

Patients and all citizens under the substance and intent of HCQIA have a right to quality assurance that is performed in the reasonable belief of veracity to improve their care. The ruling by the U.S. Fifth Circuit Court of Appeals holds that this obligation may

be carried out with a *knowledge* that the allegations are *not true* and for *any motive*; and accords, in effect, a grant of absolute federal immunity for this act. The elimination of all evidence of malice and motivation from consideration by a jury by an act of federal law is a misinterpretation of HCQIA. This ruling quite simply gives license to malicious fraudulent allegations for any ulterior motive in the name of "patient care" and accords federal immunity.

HCQIA, in its intent and meaning, constitutes an obligation to patients and citizens by federal courts to uphold the law. Actions under HCQIA are **qualified** by the requirement of a "reasonable belief" which Congress defined as more objective than requiring "good faith". The Fifth Circuit interpretation holds that federal immunity is granted for being "objectively reasonable" that an assertion is about "patient care" and that all evidence of malice and motive by being labeled "subjective" are legally irrelevant. As a result, immunity is not qualified but, in effect, becomes absolute as a matter of law. This destroys the obligation to patients and citizens of the reliability of quality assurance to improve patient care. This is true because under the appellate ruling quality assurance does *not* need to be honest and can be carried out for any motive and no evidence to the contrary is relevant. Such an interpretation undermines and completely reverses the intent of HCQIA to assure quality for patients.

The reliability of quality assurance for patients affects everyone. The current interpretation of HCQIA by the Fifth Circuit will remove rights and protection under the law from citizens. Patients will not be able to trust that quality

assurance is to improve their care. Physicians may be subjected to malicious review for any motive because it is about patient care with devastating effect. Those responsible for such acts are protected by federal immunity by hiding behind the words "patient care" and "peer review". HCQIA can only provide citizens with assurance of health care quality improvement if there is **qualification** by evidence. Protection otherwise is assured to those whose intent and motive is not patient care, but cannot be assured to physicians in acting to protect patients. Elimination of all evidence of abuse by law only serves to harm the very thing the law was meant to protect—patient care.

Quality assurance and peer review need a doctor. The meaning of HCQIA needs to be revived. The Court has the opportunity by ruling to assure for patients and society the standard of quality required by those who health care serves.

CONCLUSION

For the reasons stated above, this Court should consider the grant of the petition for a writ of certiorari.

Respectfully submitted,

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Dated: February 13, 2009

CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 Sup. Ct. R. and it is presented in good faith and not for delay.

Lawrence R. Poliner, M.D., F.A.C.C., *pro se*